IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

GREAT DIVIDE INSURANCE COMPANY, a North Dakota Corporation,	)	
Plaintiff,	)	
vs.	)	Case No. 06-CV-020-WCB
BITTERROOT TIMBERFRAMES OF WYOMING, LLC, a Wyoming Limited Liability Company and John Does 1-50,	)	
Defendants.	)	

ORDER RULING ON PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

This matter having come before the Court on plaintiff's Motion for Partial Summary Judgment, and this Court having considered the written motions and responses, having reviewed the materials on file, having heard the arguments of counsel in support of, and in opposition to said motion, and being fully advised in the premises, **FINDS** and **ORDERS**:

PARTIES AND JURISDICTION

Plaintiff, Great Divide Insurance Company, is a North Dakota corporation with its principal place of business in the City of Scottsdale, County of Maricopa, State of Arizona. Defendant, Bitterroot Timberframes of Wyoming, LLC, is a Wyoming limited liability company with its principal place of business in Teton County, Wyoming. This Court's jurisdiction over Plaintiff's

claim is proper under 28 U.S.C. 1332 (diversity of citizenship). Venue is appropriate under 28 U.S.C. 1391.

BACKGROUND

Jacobsen Construction Co., Inc. (hereinafter "Jacobsen"), served as the general contractor for construction of the Four Seasons Jackson Hole Resort (hereinafter "FSJH"), located in Teton County, Wyoming. Jacobsen subcontracted with Bitterroot Timberframes of Wyoming, LLC (hereinafter "Bitterroot") to perform exterior woodwork, such as installing siding to the exterior of the structure. Before the resort was completed, Bitterroot ceased its involvement in the FSJH project due to Jacobsen's failure to pay Bitterroot amounts owed under their contract. At some point later, Jacobsen terminated its contract with FSJH due to complications with the project. Jacobsen filed a complaint against FSJH in the Superior Court of the State of California, to which FSJH responded by filing a "cross-complaint" against Jacobsen. Thereafter, Jacobsen filed a "cross-complaint" against Bitterroot seeking indemnity and/or contribution from Bitterroot for losses Jacobsen might incur as a result of the damages claimed to have been suffered by FSJH. For purposes of the instant action, the above described suit and corresponding "cross-complaints" are referred to as the Underlying Action.

Great Divide Insurance Company (hereinafter "Great Divide") issued Bitterroot a Commercial General Liability Insurance Policy (hereinafter "Policy") in effect from August 15, 2002, until cancelled by Bitterroot on November 5, 2003. In July 2005, Bitterroot was made a party in the Underlying Action. Pursuant to the Policy, Great Divide agreed to defend Bitterroot in the

Underlying Action. However, Great Divide did so under a reservation of rights, including the right to seek declaratory relief, withdraw from the defense, and to seek reimbursement from Bitterroot.

Great Divide filed suit against Bitterroot in the United States District Court District of Wyoming seeking: 1) a judicial determination of the respective rights and obligations of plaintiff and defendant under the Policy, including a declaration that plaintiff owes no duty to defend defendant in the Underlying Action; 2) a declaration that plaintiff owes no duty to indemnify defendant for any claims, damages, and other judicial relief sought in the Underlying Action; 3) a declaration that even if plaintiff owes a duty to indemnify defendant for certain claims, damages, and other judicial relief sought in the Underlying Action, then certain other claims and damages fall outside the scope of the insurance coverage afforded by plaintiff; and 4) an award of money damages in the form of reimbursement for fees and expenses made by plaintiff in the defense of the claims in the Underlying Action for which no potential coverage existed.

Plaintiff's Motion for Partial Summary Judgment

Plaintiff, Great Divide, moves for partial summary judgment and seeks an order adjudicating that Great Divide has no duty to defend defendant, Bitterroot, in the Underlying Action. The crux of plaintiff's Motion for Partial Summary Judgment is that the Underlying Action does not give rise to plaintiff's duty to defend, as an insurer's duty to defend exists only when the underlying allegations support a potentially covered claim. *Matlack v. Mountain West Farm Bureau Mut. Ins. Co.*, 44 P.3d 73 (Wyo., 2002). Plaintiff argues that the Underlying Action fails to make the necessary allegations to support a potentially covered "occurrence" under the Policy. Plaintiff's

motion contains four major arguments why the Underlying Action fails to support a potentially covered "occurrence": 1) the Underlying Action contains no allegations of a covered "occurrence"; 2) the Underlying Action contains no allegations of covered "property damage"; 3) even if the Underlying Action contained such allegations, coverage is excluded; and 4) under Wyoming law, there is no duty to defend breach of contract claims.

The Underlying Action Contains No Allegations of a Covered Occurrence

Plaintiff believes the allegations of the Underlying Action do not support even a potentially covered "occurrence" as defined by the Policy, and that any alleged damage stems from liability defendant assumed by contract. In addition, defendant's insurance Policy for the period of August 15, 2003, to August 15, 2004, was cancelled by defendant on November 5, 2003. As a result, plaintiff asserts that even if the Underlying Action contained sufficient allegations of "property damage" such damage falls outside the coverage period. Plaintiff relies on *Friendship Homes v. American States Ins. Cos*., 450 N.W.2d 778, 780 (N.D. 1990), for the proposition that an "occurrence" takes place when the damage actually occurs, not when the wrongful act was committed.

The Underlying Action Contains No Allegations of Covered "property damage"

Plaintiff contends that defendant's insurance Policy only covered "property damage" which is defined in the Policy as physical injury to tangible property. Plaintiff argues that the "cross-complaints" filed in the Underlying Action contain no allegations that defendant caused physical

injury to tangible property, therefore, plaintiff has no duty to defend.

Any Alleged Damage is Excluded Under the Policy

Plaintiff further argues that even if the Underlying Action contained allegations of damage during the Policy period, coverage is excluded under one of the Policy's business risk exclusions. "Business risk exclusions are intended to provide coverage for tort liability, but not for contract liability of the insured for loss because the product or completed work was not that for which the other party had bargained; the exclusions are meant to remove coverage for risks which are subject to manipulation by the insured or a third party." *Grinnell Mut. Reinsurance Co. v. Lynne*, 686 N.W.2d 118, at 124 (N.D., 2004).

The "that particular part" exclusion excludes coverage for damage to "[t]hat particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the 'property damage' arises out of those operations." (Commercial General Liability Coverage Form, Sec. I(2)(j)(5)). Plaintiff argues "that particular part" is the exterior of the Jackson Hole Development, and any alleged damages purportedly caused by defendant are excluded.

Next, plaintiff turns to the " your work" and "your product" exclusions. Plaintiff argues the "your work" exclusion contained in the Policy does not cover any work to satisfy warranties of defendant's work on the development, and does not cover any restoration, or repair of property damaged by defendant's actions. Further, plaintiff argues that the "your product" exclusion covers

any wood product handled, installed or sold by defendant. Plaintiff contends that the allegations contained in the "cross-complaints" filed in the Underlying Action merely refer to defective work by defendant, and the "your work" and "your product" exclusions remove any possibility the underlying claims are covered under the Policy.

Plaintiff next argues that the Policy excludes damage to "impaired property." "Impaired property" is defined as tangible property that cannot be used or is less useful as a result of "your product" or "your work" or failure to fulfill the terms of the contract, if such property can be restored to use by repair of "your product" or "your work," or by fulfilling the terms of the contract. (Commercial General Liability Coverage Form, Sec. V(8)). Plaintiff contends there are no allegations against defendant in the Underlying Action for loss of use of tangible property resulting from the incorporation of defective wood product, and even if such allegations were made, the "impaired property" exclusion would apply since such property could be restored to use by defendant's repair or replacement of its work or product.

Finally, plaintiff alleges that defendant assumed liability to Jacobsen by entering into a subcontract to perform work on the FSJH. Plaintiff argues that the Policy's "contractual liability" exclusion expressly excludes coverage under the Policy for defendants contractually assumed duty to defend and indemnify. Plaintiff then points to the "products completed operations hazard" clause, which is present to insure against the risk that defective work or products cause injury after it leaves the insured hands. *Goodwin v. Wright*, 6 P.3d 1, 5 (Wash. Ct. App. 2000). Plaintiff claims this is

an exception to the "your work" exclusion, providing coverage where covered damage occurs after operations are complete but before the Policy period expires. Plaintiff argues, there is no possibility that any of the alleged damage occurred after defendant's work was completed but before the Policy expired as defendant cancelled the Policy on November 5, 2003, and did not walk off the job site until November 6, 2003.

No Duty to Defend Breach of Contract Claims

Plaintiff asserts that the underlying allegations all stem from breach of contract claims against the defendant. Plaintiff argues that under Wyoming law it is well settled that breach of contract claims cannot support a covered "occurrence" for liability purposes. *Action Ads, Inc. v. Great American Insurance Company*, 685 P.2d 42 (Wyo., 1984); *First Wyoming Bank, N.A., Jackson Hole, et al v. Continental Insurance Company*, 860 P.2d 1094 (Wyo., 1993). Further, plaintiff argues the duty to defend is broader than the duty to indemnify, and as a result where there is no duty to defend there can be no duty to indemnify. *Sabins v. Commercial Union Insurance Companies*, 82 F.Spp.2d 1270 (D.Wyo., 2000).

Defendant's Opposition to Plaintiff's Motion for Partial Summary Judgment

Defendant, Bitterroot, opposes plaintiff's Motion for Partial Summary Judgment, and argues that plaintiff has a duty to defend defendant in the Underlying Action. Specifically, defendant argues that the Underlying Action contains allegations of "property damage" as defined by the Policy, and the work causing the alleged "property damage" was completed prior to termination of

the Policy. Further, defendant argues that the completed work and any resulting "property damage" are covered by the "products completed operation hazard" clause contained in the Policy.

Allegations of "property damage" in the Underlying Action

Defendant argues the Underlying Action contains allegations of "property damage" as defined by the Policy, resulting from defendant's work on the FSJH, as Jacobsen's "cross-complaints" in the Underlying Action seek indemnity and contribution from defendant should FSJH prove the allegations against Jacobsen. Defendant argues that from a factual standpoint, Jacobsen has merely incorporated by reference the "property damage" allegations made by FSJH in FSJH's "cross-complaints" against Jacobsen. In support of this argument defendant points to FSJH's First Amended Cross-Complaint paragraphs 32 and 33 which state:

> 32. As a result of Jacobsen's failure to properly manage the performance of the work by both its subcontractors and its own employees, much of that work was negligently performed so as to accidentally cause physical damage to, and loss of use of, other parts of the work at the Project.
>
> 33. Since terminating Jacobsen for the Project, FSJH has discovered significant defective and non-conforming work and resulting property damage. FHJH is continuing to assess the scope and magnitude of this property damage and the incomplete, defective and incomplete installation of exterior wood finishes, out of plumb, out of square and/or out of level interior walls and /or ceilings, defective and incomplete installation of roofing tiles, and defective weatherproofing and snow melt system at the edge of roof and roof gutters.

Defendant argues this language clearly alleges Jacobsen's failure to properly manage its subcontractors, including defendant, caused accidental physical damage to FSJH. Although not specifically stated in the Underlying Action, defendant contends that FSJH and Jacobsen are

claiming that the siding supplied and installed by defendant was not properly waterproofed or installed, and that this defect allowed water to penetrate behind the siding, resulting in damage to FSJH's property. Defendant argues "property damage" as defined by the Policy has been sufficiently alleged in the pleadings of the Underlying Action, triggering plaintiff's duty to defend.

Alleged "property damage" is Not Excluded from Coverage Under the Policy

Defendant argues the "products completed operation hazard" clause contained in the Policy provides additional coverage for which defendant paid additional premiums over and above the standard general liability coverage. The "products completed operation hazard" clause states:

> a. Includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:
>
> (1) Products that are still in your physical possession; or
>
> (2) Work that has not yet been completed or abandoned. However, "your work" will be deemed completed at the earliest of the following times:
>
> (a) When all of the work called for in your contract has been completed
>
> (b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.
>
> (c) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.
>
> Work that may need service, maintenance, correction, repair or replacement, but which is otherwise compete, will be treated as completed.

(Commercial General Liability Coverage Form, Sec. V(16)). Defendant claims the work in question in the Underlying Action, is the exterior siding defendant applied to the two large Four Season buildings at Teton Village, Wyoming. Further, defendant argues the siding was applied before

November 5, 2003, and only required minor repairs and corrections. As a result, the work is deemed complete prior to the Policy cancellation date, thus falling within the "products completed operations hazard" coverage of the Policy.

Defendant argues the "property damage" resulting from defendant's completed work is not excluded from coverage rather, it is carved out from the "property damage" exclusions, or, stated more aptly, coverage is reinstated under the Policy. In reaching this conclusion defendant turns to the terms of the Policy. First, defendant looks to the subpart j of the Exclusions section which states, "[p]aragraph (6) of this exclusion does not apply to 'property damage' included in the 'products-completed operations hazard.'" The paragraph (6) referred to is also known as the "your work" exclusion argued by plaintiff. Defendant argues that the "your work" exclusion contained in the Policy does not apply to "property damage" included in the "products completed operations hazard," or at a minimum the Policy language and exclusions create ambiguity that should be construed against the insurance company.

Plaintiff's Duty to Defend

Defendant points to the Policy which contains a standard duty to defend clause. The Policy states that plaintiff will have the duty to defend defendant against any suit seeking "property damages" as defined by the Policy. Defendant argues that FSJH and Jacobsen have pleaded allegations of "property damage" resulting from an "occurrence"as defined by the Policy, triggering plaintiff's duty to defend in the Underlying Action.

LEGAL STANDARD

Summary Judgment

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Nelson v. Geringer*, 295 F.3d 1082, 1086 (10th Cir. 2002); *Russillo v. Scarborough*, 935 F.2d 1167, 1170 (10th Cir. 1991). "An issue of material fact is genuine if a reasonable jury could return a verdict for the non-movant" *Wolf v. Prudential Ins. Co. Of America*, 50 F.3d 793, 796 (10th Cir. 1995).

The moving party bears the initial burden of showing that there is an absence of any issues of material fact, and the Court must review the record in the light most favorable to the opposing party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *Hicks v. City of Watonga*, 942 F.2d 737, 743 (10th Cir. 1991). Once the moving party meets this burden, the non-moving party then has the burden to come forward with specific facts showing that there is a genuine issue for trial as to elements essential to the non-moving party's case. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp*, 475 U.S. 574, 586-87 (1986); *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 891 (10th Cir. 1991). The non-moving party cannot avoid summary judgment by resting on bare assertions, general denials, conclusory allegations or mere suspicion. *See* Fed. R. Civ. P. 56(e); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888-89 (1990) (non-moving party must offer specific

facts contradicting the acts averred by the movant that indicate that there is a genuine issue for trial). The non-moving party may not rest on ignorance of facts, on speculation, or on suspicion and may not escape summary judgment in the mere hope that something will turn up at trial. *Conaway v. Smith*, 853 F.2d 789, 794 (10th Cir. 1988). Where the non-moving party will bear the burden of proof at trial on a dispositive issue, that party must go beyond the pleadings and designate specific facts so as to make a showing sufficient to establish the existence of an element essential to that party's case to survive summary judgment. *Sorensen v. Univ. of Utah Hosp.*, 194 F.3d 1084, 1086 (10th Cir. 1999). The mere existence of a scintilla of evidence in support of the non-moving party's position is insufficient to create a "genuine" issue of disputed fact. *Lawmaster v. Ward*, 125 F.3d 1341, 1347 (10th Cir. 1997).

DISCUSSION

Plaintiff moves for partial summary judgment arguing that the Underlying Action fails to support a potentially covered "occurrence" as defined by the Policy. Plaintiff offers three major arguments in support of the motion: 1) the Underlying Action contains no allegations of a covered "occurrence"; 2) the Underlying Action contains no allegations of covered "property damage"; and 3) even if the Underlying Action contains sufficient allegations, coverage is excluded under the Policy. Since the Court finds plaintiff is entitled to judgment as a matter of law based on the conclusion that the allegations contained in the Underlying Action fail to support a potentially covered "occurrence," plaintiff's arguments concerning allegations of "property damage" and Policy exclusions need not be addressed.

Obligations and Duties Under the Insurance Policies

The legal standard governing an insurer's duty to defend an insured is well settled under Wyoming law. An insurer's duty to defend is broader and more extensive than the duty to indemnify. *Shoshone First Bank v. Pacific Employers Ins. Co.*, 2 P.3d 510, 513 (Wyo., 2000). The duty to defend is not based on the ultimate liability of the insurer to indemnify the insured or on the basis of whether or not the underlying action is successful. Rather, the duty to defend is analyzed by examining the facts alleged in the complaint that the claims are based upon. *Id.* An insurer is obligated to afford a defense so long as the alleged claims fall rationally within the Policy coverage. *Lawrence v. State Farm Fire and Cas. Co.*, 133 P.3d 976, 980 (Wyo., 2006). "The obligation to defend is an independent consideration in liability insurance, and it is invoked by any claim alleged in the complaint that is potentially covered under the Policy." *Id.* If one or more claims are potentially covered under the Policy, the insurer has a duty to defend the insured against all claims alleged in the underlying action. *Id.*

The Underlying Action

The complaints in the Underlying Action allege breach of contract and seek both express and implied indemnity and contribution from defendant should FSJH prove the allegations in its "cross-complaints" filed against Jacobsen. Defendant argues that Jacobsen and others who have brought suit against defendant in the Underlying Action have incorporated by reference the "property damage" allegations made by FSJH in FSJH's "cross-complaints" against Jacobsen. Although not

specifically stated in the Underlying Action, defendant argues that FSJH and Jacobsen are claiming that the siding supplied and installed by defendant was not properly waterproofed or installed, allowing water to penetrate behind the siding, causing damage to FSJH's property.

The Insurance Contract

If the terms of a commercial general liability coverage form are clear and unambiguous, the terms are to be interpreted by applying their ordinary and usual meaning without looking beyond the four corners of the policy. *Shoshone First Bank v. Pacific Employers Ins. Co.*, 2 P.3d 510, 513 (Wyo., 2000). However, ambiguous language will be afforded the meaning that favors the insured. *Id.* In the present case, the Policy clearly states that "[t]his insurance applies to 'bodily injury' or 'property damage' only if: (1) The 'bodily injury' or 'property damage' is caused by an '*occurrence*' that takes place in the 'coverage territory.'" (Commercial General Liability Coverage Form, Sec. I(1)(b))(emphasis added). The Policy defines "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." (Commercial General Liability Coverage Form, at Sec. V(13)). Although not specifically defined in the Policy, the Wyoming Supreme Court has defined "accident" as:

> a fortuitous circumstance, event, or happening, an event happening without any human agency, or if happening wholly or partly through human agency, an event which under the circumstances is unusual and unexpected by the person to whom it happens; an unusual, fortuitous, unexpected, unforeseen or unlooked for event, happening or occurrence;...chance or contingency; fortune; mishap; some sudden and unexpected event taking place without expectation, upon the instant, rather than something which continues, progresses or develops....

Reisig v. Union Ins. Co., 870 P.2d 1066, 1069-70 (Wyo., 1994). By its very nature an accident contemplates an unforseen event that is neither intended nor expected.

Analysis

Having described the nature of the allegations contained in the Underlying Action, it is now necessary to compare those allegations with the coverage provided by the Policy to determine if plaintiff's duty to defend is triggered by the allegations contained in the Underlying Action. The case of *Action Ads, Inc. v. Great American Ins. Co.*, 685 P.2d 42 (Wyo., 1984), involved policy language essentially the same as that found in the plaintiff's policy. In *Action Ads*, the Wyoming Supreme Court held that the liability provisions covered liability sounding in tort, not contract. The court stated that liability under the policy was limited to "tortious conduct and not on the liability which a particular insured may choose to assume pursuant to contract." *Action Ads, Inc. v. Great American Ins. Co.*, 685 P.2d 42, 45 (Wyo., 1984). After reviewing the allegations contained in the Underlying Action and the language of the Policy, this Court is unable to find a duty to defend. The allegations contained in the Underlying Action sound in contract, and fail to allege losses resulting from an "occurrence" as defined by the Policy. Nothing in the allegations suggests that any resulting damage was caused by an unintended, unforseen, or unexpected accident.[1] It is clear these claims

[1] FSJH's March 23, 2006, First Amended Cross-Complaint contains the following general allegations:
32. As a result of Jacobsen's failure to properly manage the performance of the work by both its subcontractors and its own employees, *much of that work was negligently performed* so as to accidentally cause physical damage to, and loss of use of, other parts of the work at the Project. (emphasis added).
33. Since terminating Jacobsen for the Project, *FSJH has discovered significant defective and non-conforming work* and resulting property damage. FHJH is continuing to assess the scope and magnitude of this property damage *and the incomplete, defective and incomplete installation of exterior wood finishes*, out of plumb, out of square and/or out of

sound in contract, and are the intended result of defendant's contract with Jacobsen, whereby defendant expressly assumed the duty to defend, indemnify and hold Jacobsen harmless from any claims arising out of the performance of defendant's work.

Although, defendant argues that while not specifically stated, the Underlying Action alleges that defendant improperly installed and waterproofed the siding, resulting in water damage to the FSJH resort, the facts fail to demonstrate an alleged loss resulting from an "occurrence" as defined by the Policy. Instead the allegations demonstrate losses resulting from breach of contract, as water damage is the natural and foreseeable result of improper installation and waterproofing of exterior siding, and therefore can not constitute an "accident" for purposes of determining coverage. Further, many jurisdictions hold that the natural results of negligent and unworkmanlike construction do not constitute an occurrence triggering coverage under a Commercial General Liability policy. *Great American Ins. Co. v. Woodside Homes Corp.*,---F.Supp.2d----, 2006 WL 2527425 (D.Utah, 2006) (an insured's own faulty or negligent work is not characterized as an occurrence under a commercial

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level interior walls and /or ceilings, defective and incomplete installation of roofing tiles, and defective weatherproofing and snow melt system at the edge of roof and roof gutters. (emphasis added).

Jacobsen's July 22, 2005, Second Amended Cross-Complaint contains the following allegations:

25. On May 17, 2004, FSJH filed a Cross-Complaint against Jacobsen, *alleging defects in the construction Project.* (emphasis added).

26. Thereafter, Jacobsen and FSJH agreed to settle some of the disputes. Pursuant to the partial settlement, Jacobsen dismissed its Complaint and FSJH dismissed its Cross-Complaint, *except for the Third Cause of Action for negligence* against Jacobsen. Pursuant to the partial settlement, *FSJH reserved the right to assert claims arising out of or related to latent defects and deficiencies in construction*. (emphasis added).

28. Since the filing of its Cross-Complaint, FSJH has developed and has produced to Jacobsen as *a basis for FSJH's claims asserted in its cross-complaint a preliminary list of alleged defects in the construction of the project which includes but is not limited to: the exterior siding*; water intrusion; the roof and roof heating system; drywall; the framing; and varies design related deficiencies. (emphasis added).

general liability policy); *H.E. Davis & Sons, Inc. V. North Pacific Ins. Co.*, 248 F.Supp.2d 1079, 1084 (D.Utah, 2002) (accident is something which is not a natural or intended consequence and not the result of negligence); *Monticello Ins. Co. V. Wil-Freds Const., Inc.*, 661 N.E.2d 451, 704 (Ill.App. 2 Dist., 1996), *citing J.Z.G. Resources, Inc. v. King*, 987 F.2d 98, 103 (2d Cir.1993) (defective workmanship of excavation contractor is not an occurrence); *Jakobson Shipyard, Inc. v. Aetna Casualty & Surety Co.*, 961 F.2d 387, 389 (2d Cir.1992) (faulty workmanship which does not comply with contract specifications is not an occurrence triggering coverage under CGL policy; applying New York law); *Dreis & Krump Manufacturing Co. v. Phoenix Insurance Co.*, 548 F.2d 681, 688-89 (7th Cir.1977) (property damage to industrial equipment resulting from defective manufacture is not an occurrence); *Hamilton Die Cast, Inc. v. United States Fidelity & Guaranty Co.*, 508 F.2d 417, 419-20 (7th Cir.1975) (defective manufacture of tennis racket frame is not an occurrence; applying Ohio law); *Reliance Insurance Co. v. Mogavero*, 640 F.Supp. 84, 86-87 (D.Md.1986) (occurrence "does not include the normal, expected consequences of poor workmanship"); *United States Fidelity & Guaranty Corp. v. Advance Roofing & Supply Co.*, 163 Ariz. 476, 482, 788 P.2d 1227, 1233 (App.1989) (mere faulty workmanship is not an occurrence under CGL policy); *Rivnor Properties v. Herbert O'Donnell, Inc.*, 633 So.2d 735, 751 (La.App.1994) (no occurrence where contractor's liability is based upon improper construction or defective workmanship); *Hawkeye-Security Insurance Co. v. Vector Construction Co.* (1990), 460 N.W.2d 329, 334 (Mich. App. 1990) (defective workmanship is not an occurrence under CGL policy); *McAllister v. Peerless Insurance Co.* (1984), 474 A.2d 1033, 1035-37 (N.H. 1984)

(defective workmanship is not an occurrence). It is clear that any damage alleged in the Underlying Action arises out of the alleged unworkmanlike manner in which defendant performed its contractual duties, and is not an unforseen event resulting in an "occurrence" under the Policy.[2] Defendant's inadequate preparation and installation of the siding on the resort was not an "accident" since defendant intended to perform in compliance with the contract, but allegedly failed to do so. Defendant could foresee the natural consequences of any negligence or poor workmanship, thus, any resulting damage is not considered an "accident" triggering an "occurrence" under the Policy.

Additionally, in *First Wyoming Bank, N.A., Jackson Hole v. Continental Ins. Co.*, 860 P.2d 1094 (Wyo., 1993), the Wyoming Supreme Court held that any attempt to transform a breach of contract claim into an "occurrence" by designating a cause of action as negligence, does not trigger a duty to defend. The court held that if a complaint sounds in contract, then it's not an "occurrence," even if somebody tries to label a breach of contract as an "occurrence." *Id.* The factual allegations in the Underlying Action in the present case are very limited, and as a result defendant argues that Jacobsen and the other parties who have sued defendant in the Underlying Action have merely

[2] The allegations contained in FSJH's First Amended Cross-Complaint and Jacobsen's Second Amended Cross-Complaint of the Underlying Action sound in contract. Paragraphs 32 and 33 state that "much of the work was negligently performed...FSJH has discovered significant defective and non-conforming work...and the incomplete, defective and incomplete installation of exterior wood finishes...." Paragraph 25 states that "FSJH filed a Cross-Complaint against Jacobsen, alleging defects in the construction Project." Further, paragraph 26 states that FSJH and Jacobsen dismissed their initial claims against one another except for FSJH's claims of negligence, and FSJH's right to assert further claims arising out of or related to latent defects and deficiencies in construction. Finally, paragraph 28 states that FSJH has "developed...as a basis for claims asserted in its cross-complaint a preliminary list of alleged defects in the construction project which includes but is not limited to: the exterior siding...."

incorporated by reference the "property damage" allegations made by FSJH in FSJH's "cross-complaint" against Jacobsen. Defendant argues specific factual allegations contained in the First Amended Cross-Complaint of the Underlying Action establish an "occurrence" under the Policy. Specifically, defendant refers to paragraphs 32 and 33. *See supra* note 1. Defendant argues that paragraph 32 alleges Jacobsen's failure to properly manage its subcontractors, including defendant, caused accidental "property damage." In addition, defendant argues paragraph 33 alleges FSJH discovered "property damage" resulting from the poor work of Jacobsen and other subcontractors, including defendant. Again, the Court finds that these allegations concern matters arising from the contract between Jacobsen and defendant, and do not allege losses resulting from an "occurrence" as defined by the Policy.[3] "[T]he facts cannot be magically transformed and thereby create a duty to defend" by simply denominating a cause of action as negligence or something other than breach of contract *Lawrence v. State Farm Fire and Cas. Co.*, 133 P.3d 976, 980 (Wyo., 2006).

CONCLUSION

Despite the fact that as a general rule an insurer's duty to defend is broader than the duty to indemnify, the duty to defend is not unlimited. *Matlack v. Mountain West Farm Bureau Mut. Ins. Co.*, 44 P.3d 73, 79 (Wyo., 2002) The duty to defend is measured by the risks covered under the policy and arises whenever any claim alleged in the complaint is potentially covered under the

[3] *See supra* note 2. Although paragraph 32 of FSJH's First Amended Cross-Complaint states "much of that work was negligently performed so as to *accidentally* cause physical damage to, and loss of use of, other parts of the work at the Project"(emphasis added), simply labeling a contract claim as accidental does not trigger a duty to defend.

policy. *Id.* at 80. The Wyoming Supreme Court has explained that an insurer's duty to defend is determined by comparing the language of the policy with the facts alleged in the complaint. *Id.* In applying these principles to the matters discussed above, this Court is not persuaded by defendant's argument that the Policy should be construed in favor of a duty to defend.

Absent a finding of ambiguity in the language of an insurance policy, the Court must interpret the policy according to the ordinary and usual meaning of its terms. *Shoshone First National Bank v. Pacific Employers Ins. Co.*, 2 P.3d 510, 513 (Wyo., 2000). In the instant action, the Court finds no ambiguity in the Policy language regarding an "occurrence."[4] Therefore, the Court must construe plaintiff's policy language in accordance to its plain and ordinary meaning. This leads the Court to conclude that the Underlying Action does not include allegations constituting an "occurrence" as defined by the Policy. As a result this Court holds that the allegations in the Underlying Action do not create a duty to defend since those allegations cannot reasonably be construed to establish an "occurrence"within the ordinary and usual meaning of the Policy terms.

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[4] The language of the Policy at issue is essentially similar or identical to language used in other policies. *First Wyoming Bank, N.A., Jackson Hole v. Continental Ins. Co.*, 860 P.2d 1094, 1098 (Wyo.,1993) (the insurance applies to "all sums which the insured shall become legally obligated to pay as damages because of 'property damage' to which this insurance applies, caused by an 'occurrence....' 'Occurrence' means an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured"); *Shoshone First National Bank v. Pacific Employers Ins. Co.*, 2 P.3d 510, 512-13 (Wyo., 2000) ("Coverage under the Policy for 'bodily injury' and 'property damage' applies only if the injury or damage is caused by an 'occurrence' during the policy period, as those terms are defined therein:... 'Occurrence' means an accident, including continuous or repeated exposure to substantially the same general harmful conditions."); *Reisig v. Union Ins. Co.*, 870 P.2d 1066, 1068-69 (Wyo.,1994) ("This insurance applies only to 'bodily injury' and 'property damage' which occurs during the policy period. The 'bodily injury or 'property damage' must be caused by an 'occurrence.' The 'occurrence' must take place in the 'coverage territory....' 'Occurrence' means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.").

Commercial General Liability Insurance Policies are intended to provide coverage only for fortuitous, unforeseeable events, and not for the foreseeable results of an insured's deliberate conduct, including claims for breach of contract and claims grounded in breach of contract.

NOW, THEREFORE, IT IS HEREBY ORDERED that plaintiff's Motion for Partial Summary Judgment be, and the same hereby is, GRANTED. Since the Underlying Action fails to support a potentially covered claim, plaintiff has no duty to defend defendant in the Underlying Action.

Dated this 20th day of October, 2006.

/s /
William C. Beaman, United States Magistrate Judge